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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-370

No. COA21-575

Filed 17 May 2022

Randolph County, No. 15 CRS 54251

STATE OF NORTH CAROLINA

v.

TOMMY EUGENE DOTSON

Appeal by Defendant from Judgment entered 14 April 2021 by Judge V. Bradford Long in Randolph County Superior Court. Heard in the Court of Appeals 22 March 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General Wendy J. Lindberg, for the State.

Drew Nelson, for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

¶ 1 Tommy Eugene Dotson (Defendant) appeals from a Judgment revoking his supervised probation and activating the suspended sentence for his conviction of Attempted Trafficking of Opium or Heroin. Relevant to this appeal, the Record before us tends to show the following:

¶ 2 On 29 January 2018 Defendant entered an Alford[1] plea to Attempted Trafficking of Opium or Heroin. The trial court sentenced Defendant to a suspended term of 29-47 months' imprisonment and placed him on supervised probation for 24 months. Thereafter, on 17 June 2019, the State issued a probation violation report, alleging Defendant had violated six conditions of his probation. The report listed, *inter alia*, several positive methamphetamine tests, as willful violations of the condition Defendant "[n]ot use, possess or control any illegal drug." On 25 June 2020, Defendant received a 90-day confinement for the violations in the report. Thereafter, on 16 October 2020 and 5 February 2021, respectively, the State issued two more probation violation reports. The reports alleged Defendant had violated the conditions of his probation by, *inter alia*, knowingly associating with known drug offenders, possessing illegal substances, and possessing drug paraphernalia.

¶ 3 On 14 April 2021, Defendant's case came on for a probation violation hearing in Randolph County Superior Court. At the beginning of the hearing, Defendant denied violating the conditions of his probation. The State called Defendant's probation officer, Christopher Bittner (Bittner), to testify. Bittner testified he initially met Defendant around 29 January 2018 when Defendant came to his office to review the conditions of his probation.

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[1] *See N.C. v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

¶ 4 On 15 October 2020, Bittner accompanied Randolph County Sheriff's Department to conduct a search of Defendant's residence pursuant to a warrant. Bittner testified the officers discovered approximately 1.1 grams of methamphetamine, digital scales with residue, plastic bags used to contain methamphetamine, and multiple glass smoking devices in Defendant's room. According to Bittner, the methamphetamine was field tested by the sheriff's department and returned a preliminary positive for methamphetamine and the clear crystal-like substance was sent off to the lab for confirmation. However, at the time of the probation revocation hearing, Bittner did not have the official report back from the lab. Bittner also testified at the time of the search, Samantha Jo Caudle (Caudle), a known drug offender, was present at Defendant's residence. Defendant told Bittner Caudle had been staying with him for a few nights. Bittner knew Caudle was a drug offender because she was also on probation for drug use, and since the start of her probation, had failed several drug tests.

¶ 5 Based on this testimony the trial court made the following Findings of Fact:

> the law enforcement officers, in the presence of the supervised probation officer, went to the room identified by the Defendant as his room; that in that room, the law enforcement officers found a glycine bag containing a white powdery substance. The white powdery substance field checked positive for methamphetamine.
>
> In that same room, law enforcement officers, again in the presence of the supervised probation officer, found digital scales containing residue.

Next, the law enforcement officers, in the presence of the supervised probation officer, found multiple glass pipes commonly used as smoking devices to ingest controlled substances.

Next number, the Defendant identified Samantha Jo Caudle as a[n] individual who had been staying with him for approximately two days. The Court finds that Samantha Jo Caudle was on supervised probation in Randolph County for drug use at the time of the law enforcement officers making the discovery set out above in the Defendant's room.

. . .

The Court finds that the Defendant was on probation at the time that the glass smoking devices were found in his room for the offense of attempted trafficking in Schedule 1 controlled substances, wherein he was -- period. He was found guilty on January 29th, 2018, pursuant to a plea agreement and received a presumptive range sentence of not less than 29 nor more than 47 months.

. . .

There was no testimony adduced at the hearing as to whether there is a legitimate use for the glass pipes found.

The Court further finds -- the Court concludes, as a matter of law, that the Court is reasonably satisfied that Defendant possessed drug paraphernalia and, therefore, violated the terms and conditions of his supervised probation and the criminal laws of this state subsequent to being placed on probation.

It is, therefore, ordered in the discretion of the Court -- the Court further concludes that the Defendant was in the presence of a known drug user in . . . Samantha Jo Caudle.

The Court, therefore, orders in its discretion that Defendant be terminated from supervised probation and his sentence of not less than 29 nor more than 47 months be activated . . .

Defendant gave oral notice of appeal in open court.

Issues

¶ 6 The dispositive issues on appeal are whether: (1) the trial court abused its discretion by finding Defendant committed a new criminal act under N.C. Gen. Stat. § 15A-1343 (b)(1), and thereby, activating Defendant's suspended sentence; and (2) the trial court's Judgment contains clerical errors that need to be corrected upon remand to the trial court.

Analysis

I. Violation of N.C. Gen. Stat. § 15A-1343 (b)(1)

¶ 7 Relevant to this case, under Section 15A-1344(a)—which governs the authority to alter or revoke probation—one basis for revoking probation is a violation of a condition of probation under N.C. Gen. Stat. § 15A-1343(b)(1). N.C. Gen. Stat. § 15A-1344(a) (2021). N.C. Gen. Stat. § 15A-1343(b)(1) provides, as a regular condition of probation, a defendant must "[c]ommit no criminal offense in any jurisdiction." N.C. Gen. Stat. § 15A-1343(b)(1) (2021). However, "probation may not be revoked solely for conviction of a Class 3 misdemeanor." N.C. Gen. Stat. § 15A-1344(d) (2021).

¶ 8 In this case, Defendant contends the trial court erred in finding Defendant committed the new criminal offense of Possession of Drug Paraphernalia, as opposed to Possession of Marijuana Drug Paraphernalia, because "there was no competent evidence before the trial court indicating that the paraphernalia was associated with

any controlled substance other than marijuana." N.C. Gen. Stat. § 90-113.22A, titled Possession of Marijuana Drug Paraphernalia, makes it a Class 3 misdemeanor to knowingly use or possess *marijuana* paraphernalia. N.C. Gen. Stat. § 90-113.22A (2021) (emphasis added). On the other hand, N.C. Gen. Stat. § 90-113.22, titled Possession of Drug Paraphernalia, makes it a Class 1 misdemeanor:

> to possess with intent to use, drug paraphernalia to . . . prepare, test, analyze, package, repackage, store, contain, or conceal a controlled substance *other than marijuana* which it would be unlawful to possess, or to inject, ingest, inhale, or otherwise introduce into the body a controlled substance other than marijuana which it would be unlawful to possess.

N.C. Gen. Stat. § 90-113.22 (2021) (emphasis added). Thus, Defendant asserts in the absence of a showing the alleged paraphernalia at issue was used or intended for use for a substance other than marijuana, the State failed to prove any offense upon which his probation may be revoked.

¶ 9 "The burden of proof is upon the State to show that the defendant has violated one of the conditions of his probation." *State v. Tennant*, 141 N.C. App. 524, 527, 540 S.E.2d 807, 808 (2000). However:

> A proceeding to revoke probation is often regarded as informal or summary, and the court is not bound by strict rules of evidence. An alleged violation by a defendant of a condition upon which his sentence is suspended need not be proven beyond a reasonable doubt. All that is required is that the evidence be such as to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has violated a valid condition upon which the sentence was suspended. The findings of the judge, if supported by competent evidence, and his judgment based thereon are not

> reviewable on appeal, unless there is a manifest abuse of discretion.

Id. at 526, 540 S.E.2d at 808 (alteration, citations, and quotation marks omitted). "A conviction by jury trial or guilty plea is one way for the State to prove that a defendant committed a new criminal offense." *State v. Lee*, 232 N.C. App. 256, 259, 753 S.E.2d 721, 723 (2014), *overruled on other grounds by State v. Moore*, 370 N.C. 338, 343, 807 S.E.2d 550, 554 (2017). "The State may also introduce evidence from which the trial court can independently find that the defendant committed a new offense." *Id.* (citing *State v. Monroe*, 83 N.C. App. 143, 145, 349 S.E.2d 315, 317 (1986) ("Revocation is solely within the judge's discretion and is outside of the jury's province.")).

¶ 10 In considering whether an object is drug paraphernalia, N.C. Gen. Stat. § 90-113.21(b) instructs the trial court to consider, along with all other relevant evidence, the following:

> (2) Prior convictions of the owner or anyone in control of the object for violations of the Controlled Substances Act;
> (4) The proximity of the object to a controlled substance;
> (5) The existence of any residue of a controlled substance on the object;
> (6) The proximity of the object to other drug paraphernalia.

N.C. Gen. Stat. § 90-113.21(b) (2021).

¶ 11 Here, Bittner testified, during the execution of the search warrant, officers found digital scales with residue, plastic bags used to contain methamphetamine, multiple glass smoking devices, and 1.1 grams of a clear crystal-like substance that

returned a preliminary positive for methamphetamine in Defendant's room. After the presentation of evidence, the trial court engaged in a lengthy discussion with counsel for both parties regarding the evidence and allegations, and concluded, without the lab report affirmatively showing the clear crystal-like substance was methamphetamine, the trial court would not base the probation revocation on possession of methamphetamine.

¶ 12 However, the trial court recognized that the criminal offense of possession of drug paraphernalia does not require the State to prove identity of a substance as an element. Moreover, in concluding the State had met its burden of proving the scales and pipes were drug paraphernalia *other than marijuana paraphernalia,* the trial court considered the factors outlined in N.C. Gen. Stat. § 90-113.21 including: the sheriff found the scales, pipes, and baggies all together in proximity; Defendant's prior conviction for possession of methamphetamine; and the residue on the scales. In the context of a probation revocation hearing, this evidence was competent to show the drug paraphernalia was being used for methamphetamine—not marijuana. *See Tennant*, 141 N.C. App. at 526, 540 S.E.2d at 808. Thus, the trial court did not abuse its discretion in finding Defendant committed a new crime—a Class 1 misdemeanor—in violation of the conditions of his probation. *See Tennant*, 141 N.C. App. at 526, 540 S.E.2d at 808. Therefore, upon finding Defendant committed a new Class 1 misdemeanor, the trial court did not err by revoking Defendant's probation under

N.C. Gen. Stat. § 15A-1344(a). Consequently, we affirm the Judgment revoking Defendant's probation.

II. Clerical Error in Judgment

¶ 13 Defendant also contends, however, and the State concedes, the trial court erred in its written Findings that Defendant violated the conditions set forth "in Paragraph(s) 1-4 of the Violation Report or Notice dated 10/15/2020" and "in Paragraph 1 of the Violation Report or Notice dated 02/05/2021."

¶ 14 "A clerical error is an error resulting from a minor mistake or inadvertence, especially in writing or copying something on the record, and not from judicial reasoning or determination." *State v. Lark*, 198 N.C. App. 82, 95, 678 S.E.2d 693, 702-03 (2009) (citations and quotation marks omitted). "When the trial court's written judgment contradicts its findings in open court, we will remand the judgment to correct the clerical error." *State v. Brown*, 279 N.C. App. 630, 2021-NCCOA-531, ¶ 18 (citing *State v. Newsome*, 264 N.C. App. 659, 665, 828 S.E.2d 495, 500 (2019)).

¶ 15 Here, at the revocation hearing, the trial court stated it was not going to revoke Defendant's probation based on the allegation that he was in possession of methamphetamine without a lab test. However, Paragraph 1 of the 15 October 2020 Violation Report states Defendant violated the conditions of his probation by, *inter alia*, possessing 1.1 grams of methamphetamine; and Paragraph 4 states Defendant violated the conditions of his probation by committing the criminal offense of felony

possession with intent to manufacture, sell, or distribute Schedule II Methamphetamine and Felony Maintaining a Vehicle Dwelling, or Other Place for Use, Storage, or Sale of Controlled Substances. Moreover, Paragraph 1 of the 5 February 2021 Violation Reports states Defendant violated the conditions of his probation by committing the criminal offense of Driving While License Revoked; however, the trial court did not include this offense as a basis for revocation when announcing its decision.

¶ 16 Consequently, we remand so the written Judgment may reflect the trial court's oral pronouncement that it revoked Defendant's probation based on the allegations in Paragraphs 2 and 3 of the 15 October 2020 Violation Report—knowingly associating with a known drug offender and committing the criminal offense of possession of drug paraphernalia, respectively.

Conclusion

¶ 17 Accordingly, for the foregoing reasons, we affirm the trial court's Judgment revoking Defendant's probation and activating the sentence. However, we remand to the trial court to correct the clerical errors in the Judgment.

AFFIRMED IN PART; REMANDED IN PART.

Chief Judge STROUD and Judge JACKSON concur.

Report per Rule 30(e).